

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations,  
(Atlantic and Glenwood, Iowa)

) MM Docket No. 94-122

)

) RM-8513

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To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REPLY TO OPPOSITION TO MOTION TO STRIKE AND RETURN AS  
UNACCEPTABLE COMMENTS AND COUNTERPROPOSAL**

Stephen O. Meredith ("Mr. Meredith"), by and through counsel, and  
pursuant to §1.45 of the Commission's rules, hereby submits his Reply to the  
"Opposition to Motion to Strike and Return as Unacceptable Comments and  
Counterproposal" filed by Wireless Communications, Inc. ("Wireless") on April  
18, 1995,<sup>1</sup> in the above-captioned proceeding.<sup>2</sup> In support whereof, the following  
is shown:

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<sup>1</sup> On the last page of Wireless' Opposition, the date "April 18, 1995," appears as the date of the filing. The Certificate of Service states that copies of the pleading were served by First Class Mail on "April 17, 1995." A review of the Commission's records reveals that the Opposition was, in fact, filed on April 18, 1995.

<sup>2</sup> This Reply is timely-filed pursuant to §1.45 of the Commission's rules which provides that a reply must be filed within 5 days of the filing of an opposition (plus three additional days for mailing time) not counting Commission holidays or by April 28, 1995.

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## **Background**

1. This proceeding involves the proposed reallocation of Channel 279C from Atlantic, Iowa, to Glenwood, Iowa. See, Notice of Proposed Rulemaking, 9 FCC Rcd 139 (1994)(**"NPRM"**). On the comment deadline in this proceeding, Wireless submitted what it claimed was a "Counterproposal." In its "Counterproposal," Wireless did not object to the reallocation of Channel 279C from Atlantic to Glenwood, but instead suggested that the Commission allot new Channel 239C3 to Atlantic. In his Motion To Strike, Mr. Meredith argued that Wireless' proposal to allot Channel 239C3 to Atlantic, Iowa, was not a "Counterproposal" as the Commission has defined that term, since it was not mutually-exclusive with the original reallocation proposal, and that pursuant to Commission precedent, the "Counterproposal" should be returned as unacceptable for filing.

2. In its Opposition, Wireless opposes the Motion To Strike on the grounds that (a) the Motion To Strike was not timely filed that it is therefore "procedurally defective," and (b) Wireless' proposal to retain Channel 239C3 at Atlantic, Iowa, is a "'logical outgrowth' of the NRPM and one the Commission can act upon." Opposition at p. 5, citing, Weyerhaeuser Co. v. Costle, 590 F. 2d 1011, 1031 (D.C. Cir. 1978). On the contrary, Mr. Meredith timely raised his objection to Wireless' "Counterproposal" and the "Counterproposal" is not acceptable for filing.

### **Meredith's Motion To Strike Was Timely Filed**

3. Wireless claims that the opportunity for filing objections to its "Counterproposal" (during the reply comment period in this proceeding) has passed and that Mr. Meredith's Motion To Strike, filed after this deadline, is therefore untimely. However, Wireless ignores the fact that public notice of the filing of its "Counterproposal" has never been provided. Mr. Meredith was never served with a copy of Wireless' "Counterproposal" and, to date, the Commission has never issued a public notice announcing that a "Counterproposal" was filed in this docket. Since Mr. Meredith was unaware of Wireless' "Counterproposal" until his consulting engineer noted it on a database, it would have been an unrealistic burden for Mr. Meredith to have filed his Motion To Strike before the reply comment deadline in this proceeding.<sup>3</sup>

4. Whenever a Counterproposal is filed in a rulemaking proceeding involving amendments to the FM Table of Allotments, the Commission issues a separate public notice announcing the filing and extend an opportunity for the filing of additional reply comments. See §1.405(b) of the rules. Had the Commission issued such a public notice in this proceeding, Mr. Meredith would have discovered Wireless' "Counterproposal" and he would have been able to file his Motion To Strike by the deadline set forth for the filing of additional reply comments. Since the Commission has never issued such a public notice, Mr.

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<sup>3</sup> Mr. Meredith could not have reacted to Wireless' "Counterproposal" until after it was filed on the comment date.

Meredith filed his Motion To Strike after Wireless' "Counterproposal" was discovered. Therefore, Mr. Meredith was clearly within his procedural rights to file his Motion to Strike when he did and the Motion To Strike should be considered.

**The Commission Should Return Wireless' "Counterproposal"**

5. In its Opposition, Wireless relies on "public policy" type arguments in an attempt to avoid dismissal of its "Counterproposal." For example, Wireless contends that its proposal to allot Channel 239C3 to Atlantic, Iowa, was a "logical outgrowth" of this proceeding and that it should be considered. See Opposition at p. 5. However, Wireless has not cited a single Commission precedent to support its novel legal position, nor has it cited a single rulemaking proceeding where the Commission granted a purported "Counterproposal" that was not mutually-exclusive with another proposal in the proceeding. The Commission has clearly defined the term "Counterproposal" to mean "a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." Availability of FM Broadcast Assignments, 5 FCC Rcd 931, 933, n. 5 (1990). When a party submits what purports to be a "Counterproposal" that is not mutually-exclusive with any of the other proposals set forth in the proceeding, the Commission either returns the proposal or, when appropriate, issues a Further Notice of Proposed Rulemaking to extend an opportunity for the filing of additional comments or mutually-exclusive proposals.

See, FM Table of Allotments (Canovanas, PR, et. al.), 7 FCC Rcd 334, n. 3

(1992).<sup>4</sup> To suffer Wireless' "Counterproposal" in the context of this rulemaking proceeding would set a precedent that would allow a party to frustrate the rulemaking process which affords the opportunity for the filing of mutually-exclusive proposals. This is apparently Wireless' intent.<sup>5</sup>

6. By submitting its proposal to allot Channel 239C3 to Atlantic, Iowa, as a "Counterproposal" in this proceeding and not as a Petition For Rulemaking, Wireless attempted to avoid the risk that another party may file a mutually-exclusive proposal. Wireless contends that it had no such intention and that "the absence of any reply comments, including by Meredith, are indicative of the lack of such interest on the part of anyone." Opposition at n. 2. But the fact that no reply comments were filed by outside parties in this proceeding is because the public was never given notice of Wireless' "Counterproposal" and was not afforded an opportunity to comment on it. The Commission can easily resolve this issue by returning Wireless' "Counterproposal" without prejudice to its being properly re-filed as a "Petition For Rulemaking." This will afford an opportunity

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<sup>4</sup> Unlike the Canovanas, PR case, there is no need to issue a Further Notice of Proposed Rulemaking to consider the original rulemaking proposal in this case and the proper course is to return Wireless' "Counterproposal."

<sup>5</sup> Wireless also claims that its "Counterproposal" can be accepted based upon the fact that the Commission has authority to allot a channel different from that contained in its Notice of Proposed Rulemaking. However, that authority would only permit the Commission reallocate a different channel to Glenwood, Iowa, than the one sought by the original rulemaking petitioner, and would not apply to Wireless's "Counterproposal" which was not part of the Commission's original NPRM.

for the public comment that Wireless has heretofore attempted improperly to avoid in this case.

### **Conclusion**

7. Wireless' filing is not a bona fide "Counterproposal" and it should not be treated as such in this proceeding. If the Commission accepts Wireless' proposal, then it will be improperly denying the public the full range of comment that the Commission intends in FM rulemaking proceedings. The Commission should strike Wireless' "Counterproposal" without prejudice to Wireless re-filing it as a separate Petition For Rulemaking.

**WHEREFORE**, the above-facts considered, Stephen O. Meredith hereby respectfully requests that the "Comments and Counterproposal" of Wireless

Communications Corp. filed in MM Docket No. 94-122 be **STRICKEN** and given no consideration in this proceeding.

Respectfully submitted,

**STEPHEN O. MEREDITH**

A handwritten signature in black ink, appearing to read 'Gary S. Smithwick', written over a horizontal line.

By: \_\_\_\_\_  
Gary S. Smithwick  
Shaun A. Maher

His Attorneys

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April 28, 1995

### **CERTIFICATE OF SERVICE**

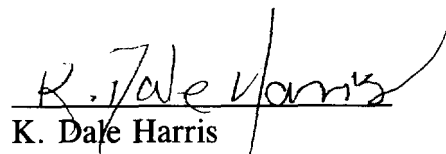
I, K. Dale Harris, a legal assistant in the law firm of Smithwick & Belendiuk, P.C., certify that on this 28th day of April, 1995, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

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